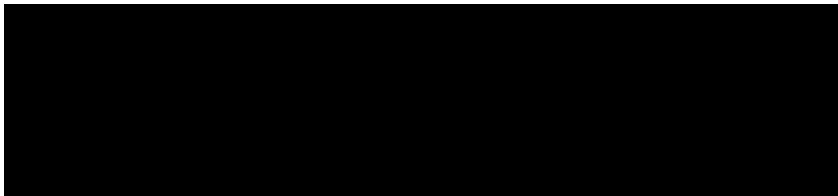




U.S. Citizenship
and Immigration
Services

34



FILE:



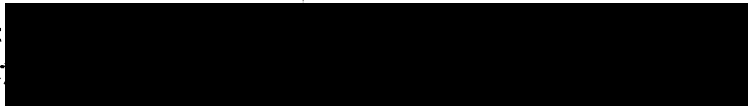
Office: TEXAS SERVICE CENTER

Date:

SEP 23 2004

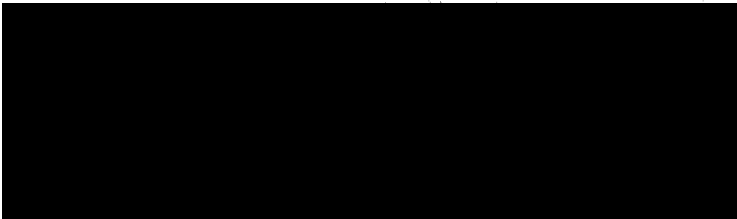
IN RE:

Petitioner:
Beneficiary



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a retail jewelry store. It seeks to employ the beneficiary permanently in the United States as a jeweler. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 24, 2001. The proffered wage as stated on the Form ETA 750 is \$30,000 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in May 2000, to have a gross annual income of \$169,058, and to currently employ two workers. In support of the petition, the petitioner submitted its Form 1120, U.S. Corporation Income Tax Return for 2001, and its checking account statements for August 2002.

The tax return reflects the following information:

	<u>2001</u>
Net income ¹	\$2,176
Current Assets	\$46,143
Current Liabilities	\$0
Net current assets	\$46,143

¹ Taxable income before net operating loss deduction and special deductions on Line 28 of the tax return.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 24, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director noted the evidence received with the petitioner's initial filing and specifically requested that the petitioner provide copies of its quarterly wages reports, and audited financial statements or other evidence to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted copies of the petitioner's checking account statements for December 2001 and December 2002, as well as the petitioner's quarterly wage reports for the quarters ending March 31, 2001, June 30, 2001, September 30, 2001, and December 31, 2001. The quarterly wage reports do not show that the petitioner paid any wages to the beneficiary during the various quarters covered by the reports. The quarterly wage reports reflect that the petitioner paid on average between \$7000 and \$9000 in total quarterly wages, which would add up to \$28,000 to \$36,000 in annual wages to all of its employees. The checking account statements reflect ending balances of \$6,076.48 in December 2001 and \$39,108.33 in December 2002.

Additionally, counsel submitted a cover letter with the response to the director's request for evidence that stated that the petitioner's owner intended to expand the business and move to another location, "making \$20,000 available for the beneficiary's payroll." Counsel attached copies of Form W-2, Wage and Tax Statements, issued to Mr. Sultan Jan, the petitioner's owner and signatory on the petition's forms.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on April 28, 2003, denied the petition.²

On appeal, counsel asserts that the petitioner's business expansion will enable the petitioner's owner to shift his compensation to the beneficiary. The petitioner submits copies of a share certificate to evidence [REDACTED] joint ownership of another business, [REDACTED] and an executed commercial lease between Jan's [REDACTED] to corroborate counsel's assertion that [REDACTED] entered into a ten-year commercial lease agreement in a mall as part of "the petitioner's" business expansion. Counsel submits the first page of Jan's Enterprise, Inc.'s corporate tax return for 2001.

Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

² The director denied the petition because the petitioner did not demonstrate enough net income to pay the proffered wage, the petitioner made modest wage payments to its employees, and there was no evidence of a business expansion that would enable more funds to pay the beneficiary's salary. Interestingly, the director correctly stated in her request for evidence that the petitioner could demonstrate the ability to pay the proffered wage by demonstrating that the petitioner's net current assets were equal to or greater than the proffered wage in all years under consideration. The director did not analyze nor mention the petitioner's net current assets in her decision.

Additionally, because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Thus, [redacted] business expansion with his unrelated business does not corroborate the petitioner's business expansion. It might corroborate a shifting of available funds for the beneficiary, however, if a nexus could be made between Jan Enterprise, Inc.'s business expansion and [redacted] not receiving compensation from the petitioner – a showing that was not made in this case.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets during the year in question, 2001, were \$46,143. This amount is sufficient to cover the proffered wage of \$30,000 per year. As such, the director's failure to consider the petitioner's net current assets, especially after specifically informing the petitioner that it could rely upon them to prove its ability to pay the proffered wage, is simply gross error.

The petitioner submitted evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 out of its net current assets. Therefore, the petitioner has established that it has the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained. The petition is approved.

³ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.